PP

v.

ARIP MAT

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CRIMINAL TRIAL NO: 45-02-97-II]
2 FEBRUARY 2000

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Proof - Circumstantial evidence - No evidence that accused was at place of crime - No evidence that murder weapon was used by accused - Whether offence not proved - Whether accused to be acquitted and discharged*

CRIMINAL PROCEDURE: *Police investigation - Cautioned statement - Admissibility - Prolonged interrogation by police - Accused suffering from swollen hands, fingers and feet and lost hearing but denied medical treatment - Whether an oppression - Whether evidence that accused had suffered agony, stress and pain - Whether cautioned statement involuntarily made - Whether inadmissible - Criminal Procedure Code, s. 113*

The accused was charged with murder under s. 302 Penal Code. The charge read that the accused had, on 16 June 1997 between 12.30pm and 1.30pm, at Upper Sungai Maong Road, Kuching, committed murder by causing the death of one Hasniwati binte Mohammad ('Hasniwati'). There was no eye witness to the alleged offence, and that being so, the prosecution sought to prove its case by way of: (i) a cautioned statement wherein the accused had confessed to the murder of Hasniwati ('ID18'); (ii) a police report of Insp Mariappan stating that on 23 June 1997 at about 1815 hours, at the scene of the crime, the accused had confessed to the murder and had given information leading to the discovery of the murder weapon; and (iii) circumstantial evidence, including evidence that an old man who resembled the accused had fetched Hasniwati from school on 16 June 1997.

The accused contended that ID18 was given after he was beaten by his interrogators, and a trial-within-a-trial was held to determine its voluntariness and admissibility. In the result, evidence was *inter alia* adduced that before ID18 was recorded, and while in police custody, the accused had suffered from swollen hands, fingers and feet and lost hearing, but was denied medical treatment by the police. There was also evidence that a day before ID18 was recorded, the police had taken the accused on a road journey for 10 hours, and that with his hands handcuffed. These apart, evidence was also led that: (i) on 23 June 1997 at 1815 hours, the

accused was in fact in the lock-up at Asajaya Police Station; (ii) Insp Mariappan had only arrested the accused on 24 June 1997, *ie,* one day after the alleged confession at the scene of crime; and (ii) Inspector Mariappan, in obtaining the confession from the accused on 23 June 1997 at 1815 hours, had not reduced that confession into writing. Against these background facts, before the learned trial judge herein, questions arose as to: (i) whether Insp Mariappan was an unworthy witness; (ii) whether ID18 was involuntarily given and was inadmissible in evidence; (iii) if so, whether the prosecution's case must on that score crumble.

Held:

[1] There was not a shred of evidence which remotely suggests that the accused had committed the murder of Hasniwati. No one saw the murder being committed. What was proved was that a headless body of Hasniwati, in a highly decomposed state, was found among the bushes at Upper Sungai Maong Road on 23 June 1997. That was all. There was no evidence even to show that the accused was at Upper Sungai Maong Road on 16 June 1997 between 12.30pm to 1.30pm.

[2] The identity of the old man was not free from doubt, at the very least, which of the old men as perceived by PW10 or PW14 who took the deceased on a motorcycle on 16 June 1997. There was not an iota of evidence to show that the old man was the accused who had taken the deceased from Sg Tapang to Upper Sungai Maong Road and then decapitated her there.

[2a] Even assuming that it was the accused who took Hasniwati as his pillion rider on the day in question, the accused could not, within a brief span of less than an hour, have travelled 37 kilometres to Sungai Maong Road to commit the foul deed, then travelled for 33 kilometres to Sungai Meranik bridge to throw away Hasniwati's head, and then travelled for another 8 kilometres to Kg Empila to bury the bloody axe in a well.

[3] The prosecution had failed to produce evidence to effectively rebut the accused's story that he was blindfolded, stripped, searched and beaten by his interrogators on 25 June 1997, and that this went throughout the day and night until 26 June 1997. The prosecution had also not rebutted the evidence that the accused had been suffering from swollen hands, fingers and feet while in police custody, or that no medical treatment had been accorded to the accused throughout the period in question, notwithstanding that his one ear had become stone deaf and the other had been infected with offensive discharge. This is oppression in its widest sense.

[3a] There was thus more than ample evidence to show that the accused was not free from fear or prejudice or hope of advantage exercised or held out by persons in authority when making ID18. Likewise, there was ample evidence to show that he had endured agony, stress and pain during the 10 days he was under detention before he gave ID18 on 27 June 1997. All these had broken the accused physically and mentally with the result that he gave ID18 not freely and voluntarily. ID18 was therefore inadmissible as evidence, and without ID18 there is nothing to connect the accused to the murder.

[3b] It also seems clear that DSP Hj Zaidi, in recording ID18, was not aware that he was talking to a deaf person who at intervals nodded his head. Further, it is established law that the statement must be in the language which the accused is at home. In the instant case, ID18 was written in Bahasa Malaysia and not in Bahasa Melayu Sarawak, a distinct dialect spoken in Samarahan area, which the accused was at home.

[4] Insp Mariappan's police report, not being reduced into writing, cannot be admitted as a cautioned statement under s. 113 Criminal Procedure Code. Also, bearing in mind PW 16's evidence that the accused was in police lock-up on 23 June 1997 at 1815 hours, and Insp Mariappan's own evidence that he had arrested the accused only on 24 June 1997, it is plainly impossible for Insp Mariappan and the accused to be at Upper Sungai Maong Road at 1815 hours on 23 June 1997. Insp Mariappan's police report is most unusual and is absolutely absurd. His evidence is clearly unworthy of credit.

[5] Assuming that the accused's alleged confession was a voluntary information made under s. 27 of the Evidence Act 1950 which led to the discovery of an axe in a well at Kg Empila, there was not an iota of evidence to show that the axe was used in the murder, or that the accused had used it. This piece of evidence, the axe, did not in any way incriminate the accused and was indeed a worthless piece of evidence.

Obiter:

[1] The prosecution's account had thrown some considerable doubts upon the reality of the alleged murder by the accused. It gives the impression that the case was haphazardly done, that the police had failed to show a high standard of professionalism. The Investigating Officer was hopeless, having depended wholly on Insp Mariappan who seems not to know right from wrong. Insp Mariappan had even

fabricated evidence *vide* the false report no. 4781/97. A rudiment knowledge of criminal law is enough to have warned the prosecution that this a wrong thing to do, bearing in mind that a man's life is on trial. It is manifestly unfortunate that the prosecution had adopted a lackadaisical attitude in the matter, and had caused the accused untold miseries, having to bear mental and physical agony for over two years internment, and above all, had put to waste a lot of precious time to all parties concerned.

[Accused acquitted and discharged.]

Case(s) referred to:
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Dato' Mokhtar Hashim v. PP [1983] 2 MLJ 198 ***(refd)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 ***(refd)***
Jayaraman & Ors v. PP [1982] MLJ 306 ***(refd)***
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Kartar Singh & Anor v. Rex [1952] MLJ 85 ***(refd)***
PP v. Law Say Teck & Ors [1971] 1 MLJ 199 ***(refd)***
PP v. Mohd Fuzi Wan Teh & Anor [1989] 2 CLJ 654 ***(refd)***
R v. Fulling [1987] 2 All ER 65 ***(refd)***
R v. Northam [1968] 52 Cr App Rep 97 ***(refd)***
Yaacob v. PP [1966] 1 MLJ 67 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113, 180
Evidence Act 1950, s. 27
Penal Code, s. 302

For the PP - Suhaimi Ibrahim DPP
For the accused - Baweng Tajang; M/s Idris & Co

Reported by WA Sharif

JUDGMENT

Muhammad Kamil Awang J:

Arip bin Mat was charged under s. 302 of the Penal Code as follows:

> That you, on 16th day of June, 1997 between 12.30 p.m. to 1.30 p.m. at Upper Sungai Maong Road, Kuching, in the State of Sarawak, committed murder by causing the death of HASNIWATI BINTE MOHAMMAD and thereby committed an offence punishable under Section 302 of the Penal Code (Act 574 Revised 1997).

He entered a plea of not guilty to the charge.

Brief Facts

Hasniwati Bt. Mohammad (the deceased) was then a 15 year old girl, living with her family at Kampong Stakan Melayu, Kuching. On 16 June 1997, as usual at about 6am she left home, took a school bus to school, SMK Sungai Tapang, which is about 7km away. On the day in question, she never returned home. Later in the day her father, Mohammad bin Busu (PW9) went to the Police Station Kota Samarahan, where he lodged a report about his missing daughter (the deceased). Acting on information, on 17 June 1997 the police picked up Arip bin Mat, a carpenter at the work site, a house under construction at Kampong Stakan Melayu, not far from the deceased's house, on suspicion of kidnapping the missing girl. Arip was taken into custody and was detained at Police Station Asajaya, and on 24 June 1997 he was taken to the Police Station Kota Samarahan and freed.

However, on 23 June 1997 a headless body of a girl which fitted the description of the missing girl, was found among the bushes at Upper Sungai Maong Road, Kuching. From investigation, the Kuching police believed that Arip was their man. On 24 June 1997 they hastened to the Police Station Kota Samarahan, and just as Arip was freed, the police re-arrested him on suspicion of murder. He was put into the lock-up at Kuching Central Police Station. As a result of a protracted and intensive interrogations by the Special Branch of the police force, Arip had allegedly given a cautioned statement (ID18) under s. 113 of the Criminal Procedure Code, wherein he confessed to the murder of Hasniwati, the deceased. Pursuant to the confession, a charge of murder under s. 302 of Penal Code was preferred against him.

There was no eye-witness to the murder. As a matter of fact, the whole of the prosecution's case rested solely on the cautioned statement (ID18). During the trial the prosecution attempted to introduce ID18 in evidence, and a trial-within-trial was conducted as to the admissibility of ID18. At the conclusion of the *voire dire* the court found that ID18 was made involuntarily, and it ruled that ID18 was inadmissible as evidence (see the annexure herein).

Without ID18, there was no evidence at all to connect Arip to the murder. As a desperate attempt to save its case, the prosecution produced a police report no. 4781/97 made by Insp. Mariappan (PW20) on 26 June 1997, which for ease of reference is reproduced below:

Pada 26.6.97 @ 1810 hrs satu pasukan polis JSJ (K) diketuai oleh ASP Jamali, ASP Wong Chee Keong dan C/ASP Zaini ditemani oleh saspek Arip bin Mat (L) 56 tahun I/C 410918-13-5163 sampai di tempat kejadian di mana jumpa mayat tanpa kepala. Pada 23/6/97 @ 1815 hrs di Upper Sg. Maong Kuching setelah saya baca caution d/s 113 KPJ pada saspek. Saspek berkata saya tetak kepalanya dengan sebilah kapak dua kali setengah, kapak saya buang dalam telaga dekat pokok asam di Kg Empila dan kepalanya buang dekat jambatan Kg. Meranik. Saya buat laporan ini d/s 27 Akta Keterangan.

This report cannot be admitted as a cautioned statement under s. 113 of the Criminal Procedure Code (CPC) for the obvious reason, non-compliance with the provisions thereof. Insp. Mariappan made the report on 26 June 1997 stating that he had administered a caution under s. 113 CPC to the accused on 23 June 1997 (ie, three days earlier) at 1815 hours at Upper Sungai Maong Road. It is to be noted that Insp. Mariappan had testified earlier in the trial-within-trial that he arrested the accused at Police Station Kota Samarahan on 24 June 1997 at 3.30pm. How could it be possible that Insp. Mariappan and the accused were at Upper Sungai Maong Road at 1815 hours on 23 June 1997? This is an unusual report which is absolutely absurd. Assuming that the statement was a voluntary information made under s. 27 of the Evidence Act 1950 as the prosecution wanted us to believe, which information led to the discovery of an axe in a well at Kampong Empila, there was not an iota of evidence to show that the axe was used in the murder, nor was there any evidence to show that Arip had used it. In my opinion, this piece of evidence, the axe, did not in any way incriminate Arip to the crime that he was charged with. Needless to say, it was a worthless piece of evidence.

The prosecution's case is a mere concoction built on doubts and conjectures of Insp. Mariappan (PW20) the prosecution's prime witness, who was assisting ASP Jamali, the Investigating Officer (PW21) in the case. His evidence is unworthy of credit. From the evidence of PW16, on 23 June 1997 at 1815 hours the accused was in fact in the lock-up at the Police Station Asajaya and it is impossible that Insp. Mariappan could at the very same time be with the accused at Upper Sg. Maong Road on 23 June 1997? It threw grave doubts over the truthfulness of Insp. Mariappan's evidence. He alleged that the accused had made a confession on 26th June, 1997 at the scene of the crime, but he made a big blunder in that this confession was not reduced into writing nor produced in court. The S113 caution (was written on a piece of paper which Insp. Mariappan had conveniently lost) was interpreted into Bahasa Melayu Sarawak at the scene of crime by ASP Jamali but Jamali had failed to recall this in his evidence. The court disregarded this piece of evidence as absurd (see trial-within-trial below).

There was not a shred of evidence which remotely suggests that Arip had committed the murder of Hasniwati (deceased). No one saw the murder being committed. There was no evidence to show that the deceased was murdered at Upper Sungai Maong Road. It was a headless body, in a highly decomposed state, found among the bushes at Upper Sungai Maong Road on 23 June 1997. That was all. There was no evidence to show that Arip bin Mat was at Upper Sungai Maong Road on 16 June 1997 between 12.30pm to 1.30pm. (see below).

Thus, without ID18 the prosecution's case was based entirely on circumstantial evidence. It is trite law that where the prosecution is relying on circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then it will not be sufficient: per Pike J in *Chang Kim Siong v. Public Prosecutor* [1968] 1 MLJ 36.

Murray-Anysley CJ in *Kartar Singh & Anor v. Rex* [1952] MLJ 85 (CCA) said that:

> In the case of circumstantial evidence ... the evidence must be such that, if it is to be believed, there is no reasonable alternative to the guilt of the accused. If it is anything less then it is no case at all.

See *Jayaraman & Others v. Public Prosecutor* [1982] MLJ 306 (FC).

Now let us examine the scientific evidence by the expert, the Chemist (PW5), who testified that there was a trace of blood stain stuck at the joint of the axe and its handle, but it was not sufficient for adequate analysis as the blood had been under water for 10 days (the axe was buried in a well at Kg. Empila). The blood was diluted or had changed a bit. He opined that it was not animal blood stain but human. Most importantly, he was not able to say positively that the blood stain was that of Hasniwati (deceased). Further, none of the experts, the chemists, the pathologist or the forensic experts were able to say with any degree of certainty the time when the deceased was killed. Was it on the 16th June, 1997 or some other day?

As the prosecution's evidence unfolded it revealed a startling case that flung in the face of logic or common sense. The prosecution began by introducing the evidence of two eye-witnesses, PW10 and PW14 who were present at SMK Sg. Tapang. On 16 June 1997 when the school broke up at 12.30pm, PW10 was at the motorcycle shed inside the school compound, about 30 metres away from the school bus which stood in front of the gate of the school, and he testified that he saw his classmate (the deceased) going to the bus at the gate and an old man in a jacket and wearing no

helmet prevented her from getting into the bus. From the distance PW10 saw his side view and he looked like the accused. Later, on his way home to Kpg. Stakan, he passed by the old man riding in the same direction on a motorcycle with the deceased as a pillion rider. PW14, was the driver of the school bus and he gave a totally different account from that of PW10. He was standing at the back of the bus when an old man approached him and asked if the bus was going to the Kampong Stakan way. He was three feet away from him. This man was wearing a helmet and he had no jacket but was wearing long trousers and long sleeve shirt. However, he could not recall the colour. The old man looked like the accused. According to PW14, the deceased was already in the bus and the old man came to the steps of the bus and called out for her. She came down from the bus and went with him. The testimonies of PW10 and PW14 were not only inconsistent with each other, in fact were at great variance as to their perceptions of the old man in as much as the description of the apparels worn by the old man was different. PW10 said that the deceased was prevented from getting into the bus by an old man, but PW14 said that the deceased was already in the bus and came down when called by an old man and went with him. These two statements were irreconcilable. In other words, the identity of the old man was not free from doubts, at the very least, which of the old men as perceived by PW10 or PW14 who took the deceased on a motorcycle on 16 June 1997? This being a criminal trial in which a person's life is in jeopardy, there must be proof beyond reasonable doubt of the identity of the person accused of murder. There was not an iota of evidence to show that the old man was Arip bin Mat who had taken the deceased from Sg. Tapang to Upper Sungai Maong Road and then decapitated her there. To summarise:

1. PW10's and PW14's evidence did not positively identify that the old man was in fact the accused person, Arip bin Mat.

2. They each saw an old man with the deceased on a motorcycle, and they did not know where they went.

3. The accused was not at the scene of crime, Upper Sungai Maong Road on 16 June 1997 between 12.30pm to 1.30pm as in the charge, because:

   a) The accused was at SMK Sungai Tapang at 12.30pm.

   b) At 1.30pm, PW22 the mother of deceased testified that the accused was at Kg. Stakan Melayu and inquired about the deceased, if she had returned from school (see below).

The prosecution had failed to prove that the old man was in fact the accused who murdered the deceased on 16 June 1997 at Upper Sungai Maong Road.

Prosecution's Story – Fact Or Fiction

SMK Sungai Tapang was quite a distance from Upper Sungai Maong Road, the scene of crime. It was about 37km by road. At noon time, the road between these two places was busy with traffic, and it took more than 1/2 hour to traverse the distance. Assuming that the accused took the deceased as a pillion rider on his motorcycle from Sungai Tapang to Upper Sungai Maong Road, the journey would take them at least half an hour. Having done the foul deed, he took the head (of the deceased), and travelled 33km away to Sungai Meranik bridge, where he threw the head into the water below. Having done that the accused took another journey of 8km to Kampong Empila, just to hide the bloody axe in a well behind his house. In a brief span of less than an hour all these took place (see below). The scene of crime at Upper Sg. Maong Road is in a residential area, where there are dwelling houses around.

The deceased was of robust built, well grown beyond her years. I don't think that she would be led like the proverbial sacrificial lamb meekly led to be slaughtered without a fight or struggle. It must have taken him sometime to kill her single-handed, and decapitate her. PW17 lived in a house 100ft. from the scene of crime. Neither he nor anyone else living in the area had heard of any scream on that particular day. It was eight days later, on 23 June 1997 that PW17 perceived a foul smell which emanated from the site where a decomposed headless body was found.

What PW10 and PW14 saw was an old man and the deceased leaving SMK Sungai Tapang on the motorcycle at 12.40pm but PW10 and PW14 did not know where they went. PW22, Melah bt. Mahidi, mother of the deceased, testified that on the day in question the accused came to the house at 1.30pm and inquired if the deceased had come home. She answered in the negative and the accused left on his motorcycle. Fatimah Bt. Arip (PW13) the daughter of the accused living at Bukit Beringin 10 km from Sungai Tapang, testified that the accused called at the house at 2pm. He came alone on a motorcycle and left the house at 4pm. On both occasions, PW13 and PW22 made no mention of blood stains on the accused or his clothes. The most crucial point is the time between 12.30pm to 1.30pm when the accused had allegedly murdered the deceased at Upper Sungai Maong Road. At 12.40pm the deceased together with a certain old man (not the accused) were seen by PW10 and PW14 at SMK Sungai Tapang, and at 1.30pm the accused came to the PW22's house to inquire

if the deceased had returned home. Why did the accused appear to be very concerned about the deceased if he himself had killed her at Upper Sungai Maong Road earlier in the day? It does not make sense. It is mind boggling that if the accused was at Upper Sungai Maong Road during that time to execute the foul deed, and could he be at PW22's house at 1.30pm? If the journeys from SMK Sungai Tapang to Upper Sungai Maong Road and thereafter to Kampong Stakan Melayu and Kampong Beringin takes more than one hour, it is unthinkable that a frail old man like the accused could possibly have committed the murder, single-handed within a short time of less than 50 minutes. The account given by the prosecution had thrown some considerable doubts upon the reality of the alleged murder by the accused.

It gives the impression that the investigation of the case was haphazardly done, the police had not shown a high standard of professionalism. The Investigating Officer was hopeless, depended wholly on Insp. Mariappan who seems not to know right from wrong. He fabricated evidence eg, the false report no. 4781/97. A rudiment knowledge of criminal law is enough to have warned the prosecution that this is a wrong thing to do, bearing in mind that a man's life is on trial. It is manifestly unfortunate that the prosecution had adopted a lackadaisical attitude in the matter, and had caused the accused untold miseries, having to bear mental and physical agony for over two years internment, and above all, had put to waste a lot of precious time to all parties concerned.

The pertinent questions: Was it not possible that the deceased was murdered elsewhere, and the headless body was dumped there at Upper Sungai Maong Road? Was it not highly probable that there were more than one person who killed her? As it were, we do not know who murdered Hasniwati. How, when and where? Above all, what is the motive of the murder? These are mysteries which remained unsolved to this day.

I am satisfied beyond reasonable doubt that the accused did not commit the murder with which he was charged. As the prosecution had failed to prove a *prima facie* case against the accused within the meaning of s. 180 Criminal Procedure Code, I hereby acquit and discharge the accused.

All exhibits are to be returned to the police for disposal.

Trial-Within-The Trial (Annexure)

The prosecution is seeking to admit a cautioned statement of Arip bin Mat, the accused, which was recorded on 27 June 1997 by DSP Hj. Zaidi. This statement was recorded at the Central Police Station, Kuching, where the accused was detained. The defence is challenging the voluntariness of the statement (ID18).

For the purpose of this entire trial the law governing the admissibility of a statement is to be found in ss. 112 and 113 of the Criminal Procedure Code. Those sections provide that a statement made by an accused person orally or in writing to any person shall be admissible in evidence notwithstanding any or all of the situations described in the sections. In other words, such statement would ordinarily be admissible notwithstanding, *inter alia*, the accused was in police custody or that he made the statement with or without caution being administered to him or that the statement would incriminate him. However, the Federal Court in *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66, 72 and *Dato' Mokhtar bin Hashim v. Public Prosecutor* [1983] 2 MLJ 198 required that the statement must in any case be voluntary.

Where a decision has to be made as to whether a statement is free and voluntary a question of fact is involved; and that question must be decided like any other question of fact, on the evidence. See *Yaacob v. Public Prosecutor* [1966] 1 MLJ 67.

In my opinion the law is that a statement should be excluded if it is shown or made to appear to the judge that the statement was not voluntary. It does not require the defence to prove beyond reasonable doubt of the existence of threat, inducement or promise. A mere possibility is however insufficient to warrant its rejection but a probability that the statement was not voluntary would suffice to make the statement inadmissible. See *Public Prosecutor v. Law Say Teck & Ors* [1971] 1 MLJ 199. According to Woodroft & Ameer Ali a "well grounded conjecture is sufficient".

In the trial-within-trial, the prosecution produced seven witnesses. The prosecution main witness DSP Hj. Zaidi (TT-PW1), was the officer who recorded a cautioned statement, ID18, from the accused and he testified that it was a free and voluntary statement made by Arip bin Mat; he never used force or in any way induced Arip bin Mat to make the statement. He testified further that he administered the caution in English and then he translated it into Bahasa Malaysia and Bahasa Melayu Sarawak. The accused nodded his head at intervals, which gave the impression that he

understood the caution, and DSP Hj. Zaidi said that Arip bin Mat appeared calm as he narrated the statement continuously without interruption (see para. 18 below).

Learned counsel Mr. Baweng Tajang cross-examined him, and he said that Arip bin Mat appeared healthy and had no superficial injury on the face. He did ask generally if there was any complaint, Arip had none. But he was not aware of any disability nor did he suspect any physical defect in the hearing of Arip bin Mat. Arip did not have a hearing aid on the day and time in question. It appeared that during the recording of the statement he did not ascertain whether Arip bin Mat could hear, or well enough to hear and understood what went on. There was no evidence to show that Arip could hear at all. The prosecution had failed to prove that the accused had no impairment in his hearing. This impairment of hearing without the necessary medical evidence was a form of oppression that negated the voluntariness of the statement.

The defence challenged that the caution was not properly explained in the language understood by the accused. DSP Hj. Zaidi administered a caution in English as it appeared in the ID18, and he translated the caution in his own words, into Bahasa Malaysia and Bahasa Melayu Sarawak. However, the translations of the caution were not written down in ID18, and Zaidi explained that the reason being that the law (ie, the Criminal Procedure Code) was in English and so the caution in Bahasa Malaysia and Bahasa Melayu Sarawak were not recorded. DSP Hj. Zaidi said that he did not know that in Malaysia laws are found both in Bahasa Malaysia and English; and he was not telling the truth as he had written down in ID18 the words "Kanun Acara Jenayah" which is the Bahasa Malaysia version of the Criminal Procedure Code. After reading the caution, the accused just nodded his head which gave him the impression the accused understood it. It seemed clear that DSP Hj Zaidi was not aware that he was talking to a deaf person who at intervals, nodded his head. It was held by a higher authority that the statement must be in the language which the accused is at home. In the instant case, ID18 was written in Bahasa Malaysia and not in Bahasa Melayu Sarawak, a distinct dialect spoken in Samarahan area, which the accused was at home.

In *Public Prosecutor v. Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 654, Sheikh Daud J (as he then was) held that it is highly desirable that the caution must not only be explained and the consequences thereto must also be explained and understood by the accused. In the case, the consequence of the caution was not explained to the accused in Bahasa Melayu Sarawak. The use of a suitably qualified interpreter seemed highly desirable in this case especially that the accused knew only a dialect of

Bahasa Melayu Sarawak, peculiar to the Samarahan region. The ID18 was recorded in Bahasa Malaysia which was not known to the accused. It was not read back to him in Bahasa Melayu Sarawak.

The fundamental principle of criminal law is that in deciding whether or not a statement made by an accused person was obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person of authority, it is not so much the state of mind of the police officer but that of the accused. "It is what the average, normal, probably quite unreasonable person in the position of the suspect at the time might have thought was likely to result to his advantage" per Winn JJ in *R v. Northam* [1968] 52 Cr. App. Rep. 97; 104.

In *R v. Fulling* [1987] 2 All ER 65, Lord Lane CJ held that the word 'oppression' must be given its ordinary dictionary meaning and applied the definition of that word as it appears in the *Oxford Dictionary* which says this:

> Exercise of authority or power in a burdensome, harsh or wrongful manner unjust or cruel treatment of subjects, inferiors etc.; the imposition of unreasonable or unjust burdens.

His Lordship went on to add that the court "finds it hard to envisage any circumstances in which such oppression would not entail some impropriety on the part of the interrogator." See also *Hasibullah bin Mohd Ghazali v. Public Prosecutor* [1993] 4 CLJ 535; [1993] 2 AMR 43 (FC).

The following testimonies of witnesses provide the background of the agony and anxiety, the stress and pain which the accused had endured during the ten long days while under detention before the cautioned statement was recorded on 27 June 1999. It is oppression in its widest sense. Initially, the accused was arrested at 5pm on 17 June 1997 at Kg. Stakan Melayu by Sgt. Ahmad bin Shahrom (PW16) and detained for eight days from 17 to 24 June 1997 at Police Station Asajaya lock-up. On his release on 24 June 1997, the accused was re-arrested by Insp. Mariappan on suspicion of murder.

The accused complained that he was not given medical treatment in respect of his ear ailment. This complaint of ear ailment obviously was not of recent origin. Three times the trial was put off over the years, to enable the accused to be given medical treatment for his ears. One ear was stone deaf, and the other was bad with offensive/profuse discharge which greatly hampered his hearing. Besides this, the accused alleged that he was suffering from sexually transmitted disease (STD), to which he did not get any treatment. There was no evidence in rebuttal; it is hardly unlikely that

the accused did endure the pain and discomfort without a murmur. All the prosecution witnesses had said was that the accused had not made any complaint. Only when he was in prison that his ears were attended to by the prison doctors. Whatever it is, there is no evidence of any medical treatment or attention being given to the accused throughout the period in question. This is tantamount to an oppressive treatment, which had to a certain degree worked on the mind of the accused, an impropriety committed by the authority.

The accused testified that on 17 June 1997 he was arrested by the police at a worksite, a house which he built at Kg. Stakan Melayu. He left his motorcycle and work tools there, and he was taken to Police Station Kota Samarahan. Later he was brought to Police Station Asajaya and detained in the lock-up for seven days, apparently as a suspect in connection with a missing schoolgirl. On 24 June 1997 he was brought before the magistrate at Kota Samarahan, and he was ordered to be released. It was about 3.30pm. While walking back to the Police Station to collect his personal belongings, he was confronted by a group of police officers, headed by Insp. Mariappan, who re-arrested him and brought him to the Central Police Station Kuching, and put him into the lock-up. It was about 4pm. This was the second time he was arrested and this time as a murder suspect. Naturally, any normal person would be very apprehensive and frightened.

On 25 June 1997 at 8am, he was taken to the court for an order of remand. On the return to the Central Police Station, he was taken to the CID room, for interrogation by S/M Morsalim and his Special Branch team consisting of five men. The accused alleged that he was blindfolded, stripped, searched and was beaten. He received a very rough treatment with kicks and punches by the Special Branch men. They even put lighted cigarette to his neck and hit him with an iron pipe. This went on throughout the day and night until the next morning (ie, 26 June 1997). S/M Morsalim and his men merely denied that nothing of this sort happened but had failed to produce evidence to effectively rebut the accused's story. The Special Branch men wanted us to believe that they just sat around during the long hours with the accused doing nothing but socialising. S/M Morsalim said that after long hours of interrogation the accused refused to admit. On the said day, 26 June 1997, at the scene of the crime, Insp. Mariappan said the accused had promptly admitted to the crime but he failed to record the admission!

At the interrogation on 25 June 1997, he gave a cautioned statement to the police, but he was not sure who the officer was. The accused was referred to ID18, he said that this was the statement that he made to the officer. When told that ID18 was dated 27 June 1997, he replied that he made two statements, one to a police officer and the other to DSP Zaidi on 27 June 1997. He appeared confused.

The accused alleged that as a result of the beating by the Special Branch police officers, he had swollen hands, fingers and his feet. Above all it affected severely his hearing; he lost the hearing of one ear and the other ear had profuse discharge. He was not given medical attention or treatment. That night he was in pain and could not sleep. This was corroborated by Nasib bte Arip (TT/DW2) who testified that when the accused was brought by the police to the house on 26 June 1997, she observed that his hands, fingers and feet were swollen. She cried when she saw the condition in which the accused was in.

On 26 June 1997 at 11am, tired and lack of sleep, he was taken for visits to Kg. Pulo Ulu, Kg. Stakan, Bt. Beringin, Sg. Meranik, Sg. Maong and Kg. Empila. It took more than ten hours, and returned to the Central Police lock up at 9pm. He alleged that he was given food only in the evening. He had pain all over his body and could not sleep. He was very nervous, exhausted and frightened. In such a state of affairs that on 27 June 1997 at 9am he was taken to the office (of ASP Jamali) where DSP Zaidi recorded a cautioned statement from him. He alleged that DSP Zaidi did not ask question and told him to narrate the statement without stopping – which he did in Bahasa Melayu Sarawak. At the beginning, Zaidi read the caution in Bahasa Melayu Sarawak, a short one, which he could not understand. At the end of the statement, he was asked to sign the statement which he did.

According to Insp. Mariappan's evidence (TT/PW5), the accused was arrested on 24 June 1997 at 3.30pm at Police Station Kota Samarahan and he was brought to Kuching and put into the lock-up at Central Police Station at 4.30pm. No interrogation of the accused was carried out that night. Mariappan could not remember who was the ERO (Enquiry Room Officer) at the time. Mariappan stayed the night in his office putting up papers in respect of the investigation. On 25 June 1997 at 8.30am he took out the accused from the lock-up and brought him to the court and obtained a remand order for 14 days. (According to the Investigation Officer's (TT/PW2) evidence the remand was for seven days.) The accused appeared normal. On the return to Central Police Station he handed the accused over to S/M Morsalim Hj. Buang for interrogation.

On 26 June 1997 when the accused was taken out of the lock-up, he looked well, and had not made any complaint whatsoever to Insp. Mariappan. At 11am in the morning a large contingent of police officers comprising of ASP Jamali, ASP Mohd. Zani and ASP Wong Chee Keong and including Insp. Mariappan took the accused to several places. A police dog team was in tow. They travelled in five vehicles, two vans and two Proton Wiras. Insp. Mariappan was in the same van with the accused, who was sitting in the back together with Sgt. Major Morsalim, L/Kpl. Nawawi and police photographer, Zuraidi.

The first stop was at the accused's house at Kg. Pulo at 12pm, – the purpose was to search for a sharp instrument such as parang but none was found. (It is strange that a typical Malay household, there is no parang or knife for everyday use.) ASP Jamali said that a few exhibits were collected there. When drinking a glass of water given by a family member, in front of his family and six police personnel in the house, the accused's hands were cuffed behind his back. When asked in the cross-examination why he was not handcuffed in front so that the accused could hold his drink, Insp. Mariappan could offer no explanation. But he rationalised that the reason why the accused was handcuffed behind his back, was for his personal safety for fear that he might run away, or seize any weapon. This is not consistent with his earlier testimony that no sharp instrument was found in the house. It sounds hollow the assertion that a 59 years old could attempt to escape when guarded by six able-bodied police personnel who were well armed. Waiting outside, were more policemen, including the dog unit.

It is indeed a harsh treatment (and the accused suffered great humiliation, especially in the presence of his family members having to take a drink with his hands cuffed behind his back.) Learned counsel for the defence put it to Insp. Mariappan that that was an excessive use of police power to which Insp. Mariappan said that he could not respond to that suggestion.

At 1pm they left for Kg. Stakan Melayu and stopped at a house under construction, built by the accused, nothing was recovered there. Then they proceeded to Fatimah's (accused's daughter) house at Bukit Beringin, and did not recover anything.

From there, they went to a bridge at Sg. Meranik where the head was allegedly thrown into the river; nothing was found. Half an hour later at 1.30pm, they proceeded to Kg. Empila. En route, at Green Road they stopped by the road side, where ASP Jamali bought some drinks and buns. Accused did not complain of being thirsty or hungry observed Insp. Mariappan.

Leaving Kg. Empila at 5.10pm, they stopped for an afternoon drink at a coffee shop along the way. Thereafter they proceeded homeward via Jalan Samarahan, through Bulatan Batu 8, Bulatan Batu 7 and Bulatan Batu 6 and at the junction of Jalan Sg. Maong, they took Jalan Keretapi, and into Jalan Sg. Maong towards Upper Sg. Maong. After passing the Sg. Maong Police station, they took a left turn to the scene of crime where the headless body was earlier found.

At this juncture, Insp. Mariappan observed through the rear view mirror in the van that the accused appeared to be nervous, fidgety, was forever looking out of the window, towards the left side. About 20km from the junction of Sg. Maong was the scene of crime – they stopped about ten feet from the spot where the headless body was found, and he took down the accused from the van, and they walked five feet to the spot, then and there – the accused confessed. Insp. Mariappan said that he arrested the accused; how absurd, the accused was in handcuffs. He administered the S113 CPC caution, and the caution was translated to the accused by ASP Jamali. (This appeared to be the first cautioned statement allegedly made by the accused to the police.) He was, however, not very conversant with S113 caution, but had it written down on a piece of paper, which he could not produce in court. Further he said that he did not threaten, promise, or force the accused to make the S113 oral statement, which was not reduced into writing nor submitted as an exhibit. This piece of evidence, very significant as it might be, was not substantiated, and it was uncorroborated by ASP Jamali in his evidence. (See below). The court disregarded this evidence as absurd.

It seemed that the accused changed vehicle at this place, Insp. Mariappan brought the accused into a Proton Wira where he sat in the back seat between L/Kpl. Nawawi and PC Zuraidi. Insp. Mariappan sat in the front seat. They proceeded back to Central Police Station. There at the station, the accused was handed to Kpl. Taib, the officer in charge of lock-up. The time was 9pm on 26 June 1997. Insp. Mariappan was certain of this fact.

Kpl. Taib's (TT-PW4) evidence did not corroborate Insp. Mariappan's evidence, quite the contrary, he testified that on 26 June 1997 he was on duty from 7am to 11am, and he was positive that no one took the accused out of the lock-up; he said that the accused was all the time in the lock-up No. 3. In the evening he was again on duty from 7pm to 11pm, he checked the lock-ups – the accused was in his cell and remained there throughout the period.

Kpl. Taib said that the accused was in cell No. 3 alone, as it were, in a solitary confinement, with two constables, a man and a woman, who stood guard.

He recalled that when he relinquished duty and left on 26th morning, at 11 o'clock, the accused was in Cell No. 3, no one had taken him out. Kpl. Taib went on to describe Cell No. 3 in which the accused was detained; it was a small room devoid of anything, fittings or furniture. There is a raised concrete platform, which served as a bed, and on which the accused slept at night, with a pillow and a blanket provided to him at 6pm every evening and removed from the cell at 6am in the morning. It seemed that TT-PW4's evidence was hostile, which was diametrically opposed to TT-PW2's and TT-PW5's evidence.

The evidence of the Investigating Officer, ASP Jamali (TT-PW2), was not very helpful. ASP Jamali cut a very pathetic figure and his evidence does not exude the confidence that he should have as the leading officer in the investigation team. He was absent-minded that he could not recall the relevant dates pertaining to his investigation, he remembered vaguely, 24, 25, 26 and 27 (not the month) somewhere in 1997. He did not take pain to have recorded these dates recorded in his diary, which he could easily have referred during the trial.

His evidence seemed to be dogged by uncertainties, and contradictions on material particulars. There was no where in his evidence that he made reference to the important oral confession or admission that the accused had allegedly made on 26 June 1997 at the scene of crime to Insp. Mariappan (TT-PW5) and in which it was said that ASP Jamali helped to interpret the S113 caution into Bahasa Melayu Sarawak to the accused (see above). It is unthinkable that ASP Jamali could not recall this vital information or let it slip his mind.

Further, he said that the accused was taken out of his cell at 11am on 26 morning, and on the return he handed over the accused to Kpl. Taib (TT-PW4) at 9pm, clearly in breach of the lock-up rules that detainees must be in their cells by 6pm. This piece of evidence was contradicted by Kpl. Taib, who was the ERO on duty on 26 June 1997 and in charge of lock-up, between the hours of 7am to 11am, and 7pm to 11pm (see above). The court presumed that ASP Jamali referred to 26 June 1997 when he said 26th morning 1997.

On 27th morning, ASP Jamali left his office without waiting for the arrival of ASP Zaidi at 8.45am, and procedurally it was desirable that the Investigating Officer should be there to identify the accused person to ASP Zaidi, whose statement was to be recorded. He left words with the ERO, ie, Kpl. Taib who was on duty from 7am to 11am on 27 June 1997 to do the needful but Kpl. Taib did not know this!

PC Nicol (TT-PW3) testified that he took the accused from the lock-up at 9am on 27 June 1997, handcuffed behind his back, to the room upstairs (ASP Jamali's office) where DSP Zaidi was waiting alone. He took off the handcuffs and left the accused in the room with DSP Zaidi and locked the room. Later, he fetched the accused from the room and handcuffed him and handed him over to the lock-up ERO.

The accused had been in custody for ten days (ie, 17 to 27 June 1997), and had suffered under a prolonged interrogation by the Special Branch men on 25 June 1997. On 26 June 1997 he was taken early in the morning until late at night, on a long trip (over ten hours, from 11am to 9pm) visiting a number of places. These journeys had obviously worn him out. Besides that there was no medical treatment rendered to him, ie, to the injuries, especially his ears as a result of been beaten and this had broken him not only physically but mentally as well. This had acted heavily on his mind within the ruling of *R v. Fulling (supra)* that he gave the ID18 not freely and voluntarily. I am satisfied that the accused did the give the ID18 under all these constraints that he did not do it voluntarily.

In the instant case, there was more than ample evidence which shows that the accused was not free from fear or prejudice or hope of advantage exercised or held out by persons in authority. Here it affected the state of mind of the accused; it is highly probable that the statement ID18 was not voluntarily made. Thus the prosecution had failed to prove beyond reasonable doubt as to the voluntariness of ID18. The court ruled that ID18 was inadmissible as evidence in the case.